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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. SUZANNE MARIE CAPELLINI (CRD No. 1357703), Respondent.	Disciplinary Proceeding No. 2020066627202 Hearing Officer–DDM

ORDER REGARDING PRE-HEARING OBJECTIONS AND MOTION IN LIMINE

I. Introduction

There are two causes of action in the First Amended Complaint. In the first cause of action, Enforcement alleges that Respondent Suzanne Marie Capellini violated FINRA's anti-money laundering ("AML") rules while she was the AML Compliance Officer ("AMLCO") at First Manhattan Co. ("First Manhattan"). In the second cause of action, Enforcement alleges that Capellini provided false or misleading information in response to three FINRA Rule 8210 requests about microcap trading activity in accounts held by Capellini's husband, RB, at First Manhattan.

Before the hearing, Capellini filed a motion in limine ("Motion") seeking to preclude Enforcement from introducing at the hearing certain evidence relating to her husband, brother, and other third parties. In the Motion, Capellini objected to 18 proposed Complainant's Exhibits ("CX"). Enforcement lodged its own objections, to eight Respondent's proposed Exhibits ("RX").

At the Final Pre-Hearing Conference ("FPHC"), I discussed the Motion and objections, and explained my rulings. This Order memorializes those rulings.

II. Legal Standards

FINRA Rule 9263 provides that the Hearing Officer "may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial."[1] Under this Rule, the Hearing Officer has "broad discretion" to accept evidence or keep it out.[2] The formal rules of evidence do not apply in FINRA disciplinary proceedings.[3] Nor do the Federal Rules of Civil Procedure.[4] But Hearing Officers may seek guidance from both the Federal Rules of Evidence and Civil Procedure in appropriate cases.[5]

Neither FINRA's Code of Procedure nor the federal rules, however, explicitly authorize motions in limine to exclude evidence before a hearing. That said, federal motion in limine "practice has developed pursuant to the district court's inherent authority to manage the course of trials."[6] Similarly, Hearing Officers are authorized "to do all things necessary and appropriate to discharge [their] duties," which include "regulating the course of the hearing."[7] Therefore, in resolving the Motion, I sought guidance from the federal case law about motions in limine, well as pre-hearing objections.

That case law is well settled. Motions in limine can "'aid the trial process' by enabling the Court 'to rule in advance of trial on the relevance of certain forecasted evidence,' without lengthy argument at or interruption of the actual trial."[8] Hearing Officers can exclude evidence that is not relevant, and exclude testimony if the proposed witness "lacks personal knowledge

[1] *Dep't of Enforcement v. Brookstone Sec., Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *110 (NAC Apr. 16, 2015).

[2] *Dep't of Enforcement v. Weinstock*, No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *37 (NAC July 21, 2016) ("FINRA Rule 9263 gives Hearing Officers broad discretion to accept or reject expert testimony.").

[3] FINRA Rule 9145(a) ("The formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series.").

[4] OHO Order 11-10 (2008012925001) (July 28, 2011), at 4, http://www.finra.org/sites/default/files/OHODecision/p126063_0.pdf (stating that "[t]he Federal Rules of Civil Procedure do not apply in FINRA proceedings").

[5] *Dep't of Enforcement v. North*, No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *35 (NAC Mar. 15, 2017) ("FINRA adjudicators may look to the Federal Rules of Evidence for guidance."), *aff'd*, Exchange Act Release No. 84500, 2018 SEC LEXIS 3001 (Oct. 29, 2018), *petition for review denied*, 828 F. App'x 729 (D.C. Cir. 2020); OHO Order 11-10, at 4 (stating that Hearing Officers may look to the Federal Rules of Civil Procedure in appropriate cases).

[6] *Flores v. FCA US LLC*, No. 1:17-cv-00427 JLT, 2019 U.S. Dist. LEXIS 120115, at *1–2 (E.D. Cal. July 18, 2019) (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)).

[7] FINRA Rule 9235(a)(2).

[8] *Ruiz v. Safeco Ins. Co*., No. 18-21036-CV-WILLIAMS/TORRES, 2019 U.S. Dist. LEXIS 109067, at *3 (S.D. Fla. Apr. 23, 2019) (quoting *Highland Cap. Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 176 (S.D.N.Y. 2008) (citing *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996))); *see also Zanakis v. Scanreco, Inc*., No. 1:18-cv-21813-UU, 2019 U.S. Dist. LEXIS 90088, at *2–3 (S.D. Fla. Apr. 11, 2019) ("A motion in limine allows the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence.") (citing *Luce,* 469 U.S. at 40 n.2).

related to the specific allegations of the Complaint or the facts underlying the conduct at issue," and where the testimony "would be cumulative of other evidence in this matter."[9]

Yet motions in limine "are disfavored, as courts prefer to resolve questions of admissibility as they arise."[10] SEC Administrative Law Judges[11] and FINRA Hearing Officers have adopted similar views.[12] So pre-hearing motions to exclude evidence should be granted only if the evidence at issue is "clearly inadmissible for any purpose,"[13] a position that FINRA Hearing Officers have also espoused.[14] Hearing Officers generally disfavor objections seeking to exclude evidence and will sustain such objections only if the challenged evidence is inadmissible for any purpose.[15] The Hearing Officer is almost always better situated during the actual hearing to assess the value and utility of evidence.[16] This is particularly true of impeachment material, which the parties must include on their pre-hearing exhibit lists if they expect to use it at the hearing.[17]

[9] OHO Order 18-09 (2014039775501) (May 3, 2018), at 2-3, http://www.finra.org/sites/default/files/OHO_Order_18-09_2014039775501.pdf.

[10] *Abernathy v. E. Ill. R.R.*, No. 3:15-cv-3223, 2017 U.S. Dist. LEXIS 160316, at *1 (C.D. Ill. Sept. 26, 2017); *see also Zanakis*, 2019 U.S. Dist. LEXIS 90088, at *3 (same); *Flores,* 2019 U.S. Dist. LEXIS 120115, at *2 (same).

[11] *See Christopher M. Gibson*, Admin. Proc. File No. 3-17184, 2016 SEC LEXIS 3379, at *4 (Sept. 9, 2016) ("[A] party filing a motion in limine faces an uphill battle because the Commission has not been enthusiastic about orders by administrative law judges granting motions in limine."). As the Chief Administrative Law Judge explained, "The Commission's long standing position is that its 'law judges should be inclusive in making evidentiary determinations,' quoting the proposition 'if in doubt, let it in.'" *Id.* at *4 (quoting *City of Anaheim*, Exchange Act Release No. 42140, 1999 SEC LEXIS 2421, at *4 n.7 (Nov. 16, 1999)).

[12] OHO Order 16-18 (2014043020901) (May 24, 2016), at 2, http://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf ("FINRA Hearing Officers generally disfavor motions in limine seeking to exclude broad categories of evidence and testimony.") (citing OHO Order 16-04 (2012033393401) (Feb. 3, 2016), at 2, http://www.finra.org/sites/default/files/OHO_Order16-04_2012033393401.pdf).

[13] *Abernathy*, 2017 U.S. Dist. LEXIS 160316, at *1 (quoting *Tzoumis v. Tempel Steel Co*., 168 F. Supp. 2d 871, 873 (N.D. Ill. 2001)); *see also Zanakis*, 2019 U.S. Dist. LEXIS 90088, at *3 ("A motion in limine should only exclude evidence when it is clearly inadmissible on all potential grounds.").

[14] OHO Order 18-09 (2014039775501) (May 2, 2018), at 4, http://www.finra.org/sites/default/files/OHO_Order_18-09_2014039775501.pdf; OHO Order 16-18, at 2 ("A Hearing Officer should grant such motions only if the evidence at issue is clearly inadmissible for any purpose.") (quoting OHO Order 16-04, at 2 (citing *Miller UK Ltd. v. Caterpillar, Inc.*, No. 10-cv-03770, 2015 U.S. Dist. LEXIS 156874, at *5 (N.D. Ill. Nov. 20, 2015))).

[15] OHO Order 20-09 (2016048837401) (July 2, 2020), at 3, http://www.finra.org/sites/default/files/2020-10/OHO_Order_20-09_2016048837401.pdf.

[16] OHO Order 16-04, at 2.

[17] Under Section VI.C of the Case Management and Scheduling Order, the parties had to "include all documents that a party expects to use at hearing for any purpose, including documents that are relevant only for impeachment purposes."

III. Pre-Hearing Objections by the Parties

A. Objections to Evidence of RB's Bankruptcies and Customer Complaints (CX-122; CX-139; CX-140)

In her Motion, Capellini objects to testimony and exhibits relating to her husband's bankruptcies and customer complaints disclosed on RB's Central Registration Depository ("CRD") record. The proposed exhibits that relate to this topic are:

- CX-122 (RB's CRD Snapshot);
- CX-139 (RB's bankruptcy petition on December 6, 2010); and
- CX-140 (RB's bankruptcy schedule dated December 20, 2010).

Capellini argues that evidence about her husband's customer complaints and bankruptcies is irrelevant, unfairly prejudicial, and would distract from the relevant issues. The customer complaints stem from conduct in the 1980s, Capellini points out, and CX-139 and CX-140 were from more than 12 years ago. And they have no bearing on whether she violated AML rules or FINRA Rule 8210.[18] Admitting such evidence would lead to mini-trials about the merits and legitimacy of the customer complaints, Capellini argues.[19] Even if evidence about the customer complaints and bankruptcies had any probative value, Capellini asserts, that probative value is substantially outweighed by the possibility of prejudice, confusion, and delay.[20]

Enforcement argues that the customer complaints and bankruptcies show RB's "questionable background," which Capellini needed to consider when discharging her duties as First Manhattan's AMLCO.[21] Enforcement also discounts the possibility of a mini-trial of extraneous issues by asserting that Capellini can testify about her understanding of the merits of the customer complaints.[22] Finally, Enforcement points out that RB appears on Capellini's witness list, and his background may be relevant to assessing the credibility of RB's testimony.[23]

For the reasons I stated at the FPHC, I find Capellini's arguments more persuasive. The customer complaints and bankruptcies are old and too tangential to the AML charges here to be

[18] Mot. 4.

[19] Mot. 5.

[20] Mot. 5 (citing *Kaufman v. Columbia Mem. Hosp.*, No. 1:11-CV-667 (MAD/CFH), 2014 U.S. Dist. LEXIS 108798, *11-12 (N.D. N.Y Aug. 7, 2014)).

[21] Department of Enforcement's Opposition to Respondent's Motion in Limine and Objections ("Opp.") 3.

[22] Opp. 4.

[23] Opp. 4.

relevant.[24] Evidence about the customer complaints also would lead to unfair prejudice, distraction, and delay. Capellini's objections to CX-122, CX-139, and CX-140 are therefore **SUSTAINED**.

B. Other Objections

Capellini objects to evidence relating to a civil suit brought by the SEC in June 2022 against an entity and several individuals, including RB and Capellini's brother (TC). Capellini also objects to certain evidence relating to background information about alleged associates of RB, some of whom are defendants in the action brought by the SEC. The proposed exhibits that relate to this topic are:

- CX-92 – CX-99 (emails obtained by FINRA from the SEC);
- CX-123 (CRD Snapshot for JD);
- CX-126 (June 26, 2000 news article about a trade suspension);
- CX-127 (Lexis report for JD);
- CX-130 (SEC complaint);
- CX-131 (RB's Answer to SEC Complaint);
- CX-132 (TC's Answer to SEC Complaint); and
- CX-145 (Judgment in SEC action against CG).

Enforcement objects to three exhibits (RX-1, RX-2, RX-3) that comprise the complete transcripts of the On-the-Record ("OTR") testimony of Capellini and her former supervisor, both of whom are expected to testify at the hearing. At the FPHC, Capellini confirmed that she will not seek to admit the entire transcripts into evidence. Instead, Capellini stated that she may use portions of the transcript for limited purposes, such as refreshing the recollection of a witness or impeachment.

Enforcement also objects to RX-10, a Confidential Settlement Agreement and General Release between Capellini and First Manhattan. The last 18 pages of RX-10 comprise an affidavit that Capellini submitted to the U.S. Equal Employment Opportunity Commission in support of her claim against First Manhattan for age and gender discrimination. Enforcement also objects to proposed exhibits that relate to Capellini's affirmative defenses, which asserts that

[24] Enforcement's AML expert does not mention the customer complaints or bankruptcies in his expert report, CX-13.

Enforcement's investigation of her was unfair and that her former firm scapegoated her. These proposed exhibits are:

- RX-6 (emails between Enforcement and WilmerHale about Capellini's contact information)
- RX-7 (email from Enforcement to Capellini trying to schedule a call);
- RX-8 (an email from Enforcement to Capellini's lawyer, attaching a public settlement document from another disciplinary matter); and
- RX-13 (a 17-page *Wells* submission, in the form of a letter and attachments from Capellini's counsel to Enforcement).

Because Capellini does not intend to introduce the entire OTR transcripts at RX-1 to RX-3 into evidence, I **DENY** the objection to those exhibits as **MOOT**. As for the remaining objections, I find that the parties failed to establish that the exhibits subject to these objections would be "clearly inadmissible for any purpose."[25] Because the parties failed to meet this high standard, I **DEFER** ruling on the admissibility of those exhibits until the hearing so that I can assess their admissibility in the proper context.

IV. Order

After considering the parties' filings and their arguments, and for the reasons stated at the FPHC, I **SUSTAIN** Capellini's objections to CX-122, CX-139, and CX-140. I **DENY AS MOOT** Enforcement's objections to RX-1, RX-2, and RX-3. I **DEFER** ruling on Respondent's Objections to CX-92 – CX-99, CX-123, CX-126, CX-127, CX-130, CX-131, CX-132, and CX-145. I also **DEFER** ruling on Enforcement's Objections to RX-6, RX-7, RX-8, RX-10, and RX-13.

SO ORDERED.

Daniel D. McClain
Hearing Officer

Dated: February 9, 2023

[25] *Abernathy*, 2017 U.S. Dist. LEXIS 160316, at *1 (quoting *Tzoumis v. Tempel Steel Co*., 168 F. Supp. 2d 871, 873 (N.D. Ill. 2001)).

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